

Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation

I. INTRODUCTION

Demands of sexual concessions in exchange for job benefits have long been a common abuse of personal power at the office.¹ Likewise, the surreptitious squeeze on the factory floor, the clandestine kiss in the copyroom, the lewd remark, and the obscene suggestion have been standard procedure at many places of employment.² Not only did the victim of such attacks have no legal recourse, but she³ frequently was led to believe that the behavior she found offensive was normal and should be taken in stride.⁴ Sexual harassment was not even considered to be a legal issue until the last decade.

In June of 1986, the United States Supreme Court first addressed the issue of on-the-job sexual harassment⁵ with the case of *Meritor Savings Bank v. Vinson*.⁶ Instead of clarifying the developing sexual harassment law, the *Meritor* decision raised as many questions as it answered, and left the lower courts to wade through a swamp of ambiguities.⁷ Since its early evolution in the 1970s, sexual harassment law has become and continues to be a legal morass; lower court discrepancies in interpretation of the law since *Meritor* serve as evidence of this fact.⁸ It is now clear that courts need federal legislative guidance to move confidently and uniformly in this new and rapidly growing area of law. But confusion in the judiciary is slight

1. C. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-40 (1979).

2. *Id.* at 40-47.

3. While the author recognizes that males in the workplace may be sexually harassed by female or male supervisors, and that female employees may be sexually harassed by female supervisors, this Comment will use the feminine case to refer to the sexually harassed employee and the masculine case to refer to the harassing supervisor. Such grammatical structure reflects the vast majority of sexual harassment cases that reach the courts.

Also, when this Comment mentions sexual harassment in the workplace, it is referring to the harassing acts of a supervisory employee toward a nonsupervisory employee. The scope of the term is thus restricted to keep a pure focus on relevant arguments and avoid sidestepping into questions of peer-employee harassment and customer or client harassment.

4. C. MacKinnon, *supra* note 1, at 27-28.

5. "Sexual harassment," as it will be used in this Comment, consists of two distinct types of activity. The first is "*quid pro quo*" sexual harassment in which tangible employment benefits or detriments are conditioned upon submission to a superior's sexual advances, and the second is "hostile environment" sexual harassment, where a supervisor creates or allows to be created a discriminatory work environment. See *infra* notes 125-39 and accompanying text. Each of these definitions encompasses elements of attempted sexual imposition as well as traditional discriminatory activity. These exclusively sexual elements add a dimension to sexual harassment that makes it a different type of problem than racial, religious, or ethnic harassment. See *infra* notes 14-24 and accompanying text.

6. 106 S. Ct. 2399 (1986).

7. Of the three major questions that confronted the Court in *Meritor* (Does Title VII provide a cause of action for "hostile environment" sexual harassment? Did the district court err in admitting certain testimony relating to the plaintiff's sexually-oriented behavior? Under what standard of liability should the employer be held in sexual harassment cases? See *id.* at 2409.), the majority left distinct ambiguities pertaining to the answers to two questions. The majority opinion in *Meritor* left pressing questions as to the extent of employer liability, one of the most important aspects of sexual harassment litigation. *Id.* at 2408-09. Also, while the majority addressed procedural problems of evidence which arise when deciding whether the sexually-oriented action was "unwelcome," they did not issue a comprehensive statement on the subject. *Id.* at 2406-07.

8. See *Volk v. Coler*, 638 F. Supp. 1555 (C.D. Ill. 1986); *Bowen v. Valley Camp of Utah, Inc.*, 639 F. Supp. 1199 (D. Utah 1986); *Bohen v. City of E. Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 952 (1987).

compared to the confusion suffered by those most directly affected by sexual harassment regulation: employers, managers, and workers. Employers need the same guidance to determine how to behave in relation to a new legal liability and to understand what acts are actionable, against whom, and under what law.

While Title VII of the Civil Rights Act of 1964⁹ (the "Act") is often perceived as the basis for current sexual harassment law, Congress has never directly addressed the issue of sexual harassment.¹⁰ Administrative and judicial actions have implied into the Act an intent to regulate sexual harassment.¹¹ However, Title VII's sparse legislative history shows absolutely no attempt to address the sexual harassment issues that courts and agencies are currently regulating under the Act.¹²

This Comment calls for congressional action for the prohibition and regulation of sexually harassing conduct in the workplace. Section II will show that federal legislative action is needed for at least three reasons. First, on-the-job sexual harassment is an important social issue that is rapidly becoming an important legal issue. Second, the decision makers who are currently handling the issue are not equipped to handle it properly. Finally, the United States Congress, the one legal body best equipped to address the problem, has not yet explicitly addressed it. The remainder of the Comment will discuss what type of action Congress should take. New legislation, whether passed as an amendment to existing legislation or as a new law, should provide a cause of action for both currently-recognized forms of sexual harassment, *quid pro quo* sex discrimination and harassment through creation of a hostile work environment.¹³ It should also assign liability for both the harassing employee and the employer.

II. CONGRESS SHOULD REGULATE EMPLOYMENT-RELATED SEXUAL HARASSMENT

A. *Work-Related Sexual Harassment: An Important Social and Legal Issue*

Sexual harassment is a complex and difficult social problem that has become an increasingly troublesome legal problem. Lawmakers need to regulate it, but they need to do so carefully. As harassment claims increase, courts and agencies, as well as employers and workers, will realize the need for logical, cohesive, and authoritative rules addressing the problem. Sexual harassment is an important issue that must be addressed by Congress because: it is demeaning conduct that deserves censure; the complexity of the issues necessitates a well-reasoned solution; and sexual harassment continues to grow in social and legal importance.

9. 42 U.S.C. §§ 2000e – 2000e-17 (1982).

10. See *infra* section II (C).

11. *Id.*

12. See *infra* notes 112–24 and accompanying text.

13. See *supra* note 5.

1. *Sexual Harassment Is Demeaning Treatment Deserving of Censure*

In the nineteenth century, legislators and courts decided that work-related discrimination based on race, religion, or ethnicity was inconsistent with the fundamental principles of America's system of government.¹⁴ Only recently have legislators declared that "discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."¹⁵ Employment-based sexual harassment is just as dehumanizing as other forms of discrimination; it changes the focus in an employment relationship from the merits and work performance of an employee to the sexuality of that employee.¹⁶ In addition, sexual harassment degrades women by reinforcing their traditionally inferior role in the workforce.¹⁷

14. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (national origin); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (race).

15. H.R. REP. NO. 238, 92d Cong., 1st Sess. 5, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2141.

16. By confusing a woman's sex role with her role in the workplace, a harassing supervisor evaluates women employees with an entirely different set of criteria than he would other employees. In this "sex role spillover," women are perceived more for their sexual attributes than their employment attributes, creating a skewed and unfair standard of job evaluation. The spillover attitude is especially strong where a woman takes a traditionally "man's job." B. GUTK, *SEX AND THE WORKPLACE* 129-52 (1985). See also L. FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 28-51 (1978).

However, many social scientists feel that sexual harassment is not driven by social or courting impulses as much as it is driven by the desire to assert power over a person in a vulnerable position. They believe that supervisors use their position of power to prove dominance over others, thus inflating their self-image. This "power dominance theory" of sexual harassment is well supported. See Renick, *Sexual Harassment at Work: Why It Happens, What to Do About It*, 59 PERSONNEL J. 659, 662 (1980); Maypole & Skaine, *Sexual Harassment of Blue Collar Workers*, 9 J. Soc. & Soc. WELFARE 682, 686, 694 (1982); Tangri, Burt, & Johnson, *Sexual Harassment at Work: Three Explanatory Models*, J. Soc. ISSUES 38, 55-74 (1982). For example, the more vulnerable a person is, the more prone she is to be harassed. The federal government's Merit Protection Board Survey of federal workers noted that women are more likely to be harassed by supervisors than are men, and that younger women and single or divorced women are most likely to be harassed. U.S. MERIT SYSTEMS PROTECTION BD., OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE—IS IT A PROBLEM?* 33-36, 43 (1981) [hereinafter MERIT SYSTEMS SURVEY].

Also supporting the power dominance theory are statistics showing that women who seem to be more of a threat to men, usually by higher education or entry into a traditional male occupation, are more likely to be harassed than women in a traditional female occupation. In theory, some men feel threatened by women who invade traditionally male territory, such as construction jobs or the legal profession. These men sexually harass women to reassert the male dominance they feel they are losing when women enter these job markets, and to compensate for their discomfort with a society which allows women in roles that "belong to men." Illustrating this fact, 53% of female federal employees in nontraditional jobs reported being sexually harassed as compared to 41% in traditional jobs. MERIT SYSTEMS SURVEY at 44, 50-51. Statistics also show that the highest incidences of sexual harassment were reported by women with some graduate school education (53%), women with college degrees (50%), and women with graduate or professional degrees (48%). MERIT SYSTEMS SURVEY at 44-45. The Merit Systems Protection Board suggests that because "men see women entering their 'territory' as a threat, [men] respond by using sexual harassment to try to limit the women's success or to get them to leave." MERIT SYSTEMS SURVEY at 50-51.

For a brief, yet complete discussion of the harmful effects of sexual harassment, see Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1464-67 (1986). For a thorough discussion of motivating factors and statistical results involved in sexual harassment, see Brief for Women's Bar Association of Massachusetts, Minnesota Women Lawyers, Inc., Women Lawyers Association of Michigan, Colorado Women's Bar Association as Amici Curiae at 4-13, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979).

17. Catherine MacKinnon illustrates this when she writes:

Sexual harassment at work critically undercuts women's potential for work equality as a means to social equality. . . . A job, no matter how menial, offers the potential for independence from the nuclear family, which makes women dependent upon men for life necessities. . . . Sexual harassment on the job undercuts a woman's autonomy outside the home by sexualizing her role in exactly the same way as within the family: sexual imposition combined with a definition of her work in terms of tasks which serve the man. . . .

C. MacKinnon, *supra* note 1, at 216-17. In addition, "sexual harassment serves to remind both the employee and the

2. *The Complexity of Sexual Harassment Issues Necessitates Well-Reasoned Solutions*

Sexual harassment is harmful, but it must be regulated with great care. In the general sense, all discrimination prohibitions are opposed to the fundamental majoritarian notions of nonintervention that pervade the American legal system.¹⁸ "Discrimination law is an exception to the legal system's basic unwillingness to intervene in those processes of social selection which systematically produce variances in social outcomes"¹⁹ More specifically, sexual harassment presents problems that do not occur with other forms of discrimination.²⁰ While sexual harassment is harmful in many of the same ways in which racial, religious, or ethnic discrimination is harmful, sexually-oriented speech includes an added dimension of legitimate traditional courtship activity²¹ which makes it more difficult to regulate than speech focusing on race, religion, or ethnicity.²² As counsel for the United States and the Equal Employment Opportunity Commission (EEOC) notes in their brief as *Amici Curiae* to the Supreme Court in the *Meritor* case: "Sexual attraction is a fact of life, and it may often play a role in the day-to-day social exchange between employees in the workplace."²³

In many cases, behavior reflecting a natural sexual attraction in daily social exchange is socially acceptable and therefore counterbalances the reasons to regulate sexually-oriented speech or acts.²⁴ In other words, since no legitimate reason exists

employer, that as a woman she is still seen as a sexual object rather than a contributing worker." Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 418 (1980).

18. See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444, 452.").

19. C. MacKinnon, *supra* note 1, at 106.

20. As Judge George MacKinnon observed in his well-reasoned concurrence to *Barnes v. Costle*:

Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.

561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring). Even Joan Vermeulen, the Legal Director for the National Sexual Harassment Legal Back-Up Center of the Working Women's Institute and a leading advocate of strict prohibitions on sexual harassment, recognizes a "valid concern" that "sexual advances, if not actually flattering and appreciated, are at least not intrinsically offensive. . . ." Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U.L. Rev. 499, 529 (1981).

21. In this Comment, "traditional courtship activity" refers to speech or acts based on attraction between two people of the opposite sex. This can be premarital courtship or engagement in any legitimate public form, including dating or speech and activities associated with dating.

22. Not only is sexual harassment the most difficult form of harassment to regulate, but it is also the most difficult to prove. Because of the courtship/sexual-attraction aspect, much sexual harassment occurs when the employee is alone with the supervisor; thus, in many cases, no witnesses can verify the harassing words or actions and the employee is left with her word against that of her supervisor. Contrast with traditional racial, religious, or ethnic harassment in which public humiliation is often a goal of the harasser and witnesses to harassment are usually plentiful.

23. Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* at 13, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979).

24. "[C]onduct that any reasonable person would readily regard as offensive harassment if unwelcome will lose that character entirely if directed toward another person in a consensual relationship in which it is welcomed. . . . [A] subtle breakdown of, or alteration in that relationship may transform conduct that was originally not a Title VII offense, because then 'welcomed,' into an actionable wrong." Brief of Trustees of Boston University as *Amicus Curiae* at 9-10, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979). Furthermore, the fact that only sexual harassment

to make racially-oriented comments, the government can regulate these comments with a broad sweep. However, since there may be legitimate reasons to make sexually-oriented comments, regulation of those comments must be made with care not to stifle legitimate remarks while outlawing illegitimate ones.

a. *The Right to Traditional Courtship Activity*

Sexually-oriented speech or activity can be considered legitimate if it is not coercive, is not offensive, and is part of the customary and normal courtship process.²⁵ Not only is this speech or activity legitimate, but it is probably constitutionally protected under certain court-implied rights. The Supreme Court recognizes a right to privacy of social association²⁶ and a more restricted, less clearly defined right to personal sexual choice.²⁷ These rights imply the existence of at least a limited right to sexual association.

A right to traditional premarriage courtship activity can be implied from Supreme Court interpretations of associational freedoms. The Court has recognized the existence of constitutionally protected forms of private and nonpolitical, social association.²⁸ Marriage has been the Court's example of such an association.²⁹ In several cases, the Court recognized that marriage involves interests of basic importance to society,³⁰ in effect recognizing a right to marry. Justice Douglas described marriage as one of the "basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."³¹ Co-existent with the right to marry, the Court has defined a right to choose a marriage partner,³² thereby implying a right to sexually-based association. If an individual has a right to marry and a right to choose a spouse, then that individual must be permitted the practical actions that comprise "choosing" a spouse.³³ Therefore, the Court would probably construe a right to association designed to lead to marriage. If the right to

has *quid pro quo* and environmental distinctions is evidence of the difference between sexual harassment and religious, racial, or ethnic harassment.

25. See *infra* text accompanying notes 28-44.

26. See *infra* notes 28-41 and accompanying text.

27. See *infra* notes 42-44 and accompanying text.

28. See *Bowers v. Hardwick*, 106 S. Ct. 2841, *reh'g denied*, 107 S. Ct. 29 (1986) (reconfirms a right to marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protected the right to associate in forming a marriage); *NAACP v. Button*, 371 U.S. 415 (1963) (protected forms of association that are not political, but are exclusively for social benefit); *NAACP v. Alabama*, 357 U.S. 449 (1958) (protected freedom to associate and privacy in one's associations, found in the penumbra of the first amendment).

29. "We deal with a right of privacy older than the Bill of Rights. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

30. *Bowers v. Hardwick*, 106 S. Ct. 2841, *reh'g denied*, 107 S. Ct. 29 (1986); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

31. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

32. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

33. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Certain liberties fundamental to the right of privacy in marriage are protected by that right.).

marry and the right to social association are constitutionally protected, then the traditional premarriage courtship process should also be protected.³⁴

In fact, the Court in recent decisions has held that the Bill of Rights affords "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."³⁵ The Court in *Roberts v. United States Jaycees*³⁶ noted that only relationships with certain qualities—"relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship"³⁷—are likely to reflect "the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."³⁸ In a May 1987 decision, *Board of Directors of Rotary International v. Rotary Club of Duarte*,³⁹ the Court reaffirmed the associational protections defined in *Roberts*.⁴⁰ The majority in *Rotary* stated,

[W]e have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the first amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, [468 U.S.] at 619–20.⁴¹

A traditional premarriage courtship relationship could fall within the associational protection defined in the *Roberts* and *Rotary* decisions. Such a relationship is small, intimate, selective, and excludes others from critical aspects of the relationship.

Aside from associational protections, a right to traditional courtship activity can also be implied from Supreme Court decisions concerning privacy of certain types of sexual choice. Justice Blackmun noted that a right of privacy extends to activities relating to marriage, procreation, and family relationships.⁴² Justice Brennan observed that if the court-fashioned constitutional right to privacy means anything,

34. This right probably only applies in heterosexual relationships. See *Bowers v. Hardwick*, 106 S. Ct. 2841, *reh'g denied*, 107 S. Ct. 29 (1986).

35. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (citing, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court then roughly defined the types of personal relationships which it found to be constitutionally protected:

Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 618, 619 (citations omitted).

36. 468 U.S. 609 (1984).

37. *Id.* at 620. The Court noted that "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."

38. *Id.*

39. 107 S. Ct. 1940 (1987).

40. "The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate." *Id.* at 1945.

41. *Id.* at 1946.

42. See *Roe v. Wade*, 410 U.S. 113, 129, *reh'g denied*, 410 U.S. 959 (1973).

"it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as whether to bear or beget a child."⁴³ Despite recent limitations on the doctrine, the constitutional right to privacy seems to include some forms of sexually-based association.⁴⁴ Under either the right to association or the right to privacy, traditional courtship activities are probably protected by the Constitution. Even if they are not specifically protected, marriage, courtship, and privacy are still within the sphere of constitutional interests.⁴⁵ These courtship activities weigh against the negative aspects of sexual harassment, making sexual harassment much more difficult to regulate than other forms of discrimination.⁴⁶

b. The Difficulty of Differentiating Between Consenting Relationship and Harassment

The problems of regulating sexually-oriented behavior in the workplace are magnified by the fact that this behavior can be abused to gain advantage for either of the involved parties. On one side, a supervisor can abuse his position of power to force sexual submission from a nonsupervisory employee.⁴⁷ This traditional sexual harassment is thought to be common in the workplace and, unless the actions are blatant,⁴⁸ is very difficult to prove.⁴⁹ On the other side, a nonsupervisory employee can use charges of sexual harassment to extract revenge from a company or a supervisor with whom she is not satisfied, or even use sex as a weapon for advancement, knowing that if her plan fails, she can always claim sexual harassment.⁵⁰ In either case, defining the line between a legitimate, consenting relationship and sexual harassment lies in the often subtle attitudes, intentions, and actions of the

43. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

44. See *Bowers v. Hardwick*, 106 S. Ct. 2841, *reh'g denied*, 107 S. Ct. 29 (1986) (right to marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (right to termination of pregnancy in some cases); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraception for unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception for married persons).

45. See *supra* notes 28-44 and accompanying text.

46. An important problem arises when courts apply employer liability in hostile environment harassment cases because supervisor sexual harassment is usually not sanctioned by the employer. When a supervisor makes sexually-oriented comments to an employee, whether those comments are taken to be complimentary or derogatory, he is obviously not acting within the scope of his employment.

Recent court decisions, including *Meritor*, have applied agency principles in finding employers liable for the harassing acts of their supervisors. "[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." 106 S. Ct. 2399, 2408 (1986). But, according to classic agency principles, an employee is not defined as an agent when performing an act outside the scope of employment. P. KEETON, PROSSER AND KEETON ON TORTS § 70 (5th ed. 1984); RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); see *Ferguson v. E. I. du Pont de Nemours and Co.*, 560 F. Supp. 1172, 1196-99 (D. Del. 1983); see also RESTATEMENT (SECOND) OF AGENCY § 165 comment (c) (1958) ("If [a party] knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face, and the principal is not bound unless the agent is authorized."). Thus, under agency principles, most cases of hostile environment sexual harassment, especially those dealing with personal physical attraction, should not be imputed to the employer.

However, while the logic used by courts to justify employer liability may be flawed, the best possible policy result is attained through the rule. See *infra* section II (B).

47. C. MacKINNON, *supra* note 1, at 32-47.

48. *Id.* at 26-30.

49. See *supra* note 22.

50. See, e.g., Smith, Yes, *The Ambitious Office "Femme Fatale" Can Indeed "Have It All"*, L.A. Daily J., Aug. 29, 1985, at 4, col. 3.

involved parties. "Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous."⁵¹

In addition, courts and commentators have wrestled with ambiguities in defining the word "sex" for the purposes of proving sex discrimination.⁵² Sex has several distinct denotations,⁵³ and many courts have been willing to interpret Title VII proscriptions to include relationship-based discrimination,⁵⁴ while many others have refused to extend them beyond gender-based discrimination.⁵⁵ When the Eighth Circuit tried to limit the Title VII definition of sex to its "plain meaning" and "traditional definition," they did not reconcile the multiple meanings of the word as it can apply in modern sex discrimination cases.⁵⁶

The sexual harassment discussion in *DeCintio v. Westchester County Medical Center*⁵⁷ best exemplifies this problem. In *DeCintio*, the Second Circuit found that Title VII does not provide a cause of action for a male therapist who was denied promotion because the department administrator promoted a female therapist with whom he was romantically involved.⁵⁸ While acknowledging that romantic favoritism in job promotion is an unfair practice, the unanimous court declared that holding it to be a Title VII sex discrimination violation "would involve the EEOC and federal

51. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979).

52. See *infra* notes 53-54.

53. The most relevant denotations of the word "sex" for this discussion are: the one describing gender, "one of the two divisions of organic [beings], especially human beings, respectively designated male or female," and the one describing physical attraction, "the sphere of interpersonal behavior especially between male and female most directly associated with, leading up to, substituting for or resulting from genital union" and "the phenomena of sexual instincts and their manifestations." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1986).

54. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). The *Barnes* court found sexual advances to be legally linked to the gender of the plaintiff, thus melding the two most important distinct denotations of the word "sex" (see *supra* note 53). The court held that the plaintiff "became the target of her superior's sexual desires because she was a woman. . . ." *Id.* at 990. While this semantic device has been convenient in allowing sexual harassment cases to fall within the reach of Title VII, it artificially combines relationship-oriented discrimination and gender-oriented discrimination under the deceptively broad title of sex discrimination.

The *Barnes* court recognized the logical discrepancies created by their definition when they observed that, because of their approach to the problem, a plaintiff who was sexually harassed by a heterosexual or homosexual supervisor has a cause of action under Title VII, while a plaintiff who was sexually harassed by a bisexual supervisor does *not* have the same cause of action. *Id.* at 990 n.55. The law against sexually-abusive conduct at the workplace should provide relief based on findings about the conduct itself and not on the expansiveness of the supervisor's taste in victims. Using the *Barnes* rationale, a defendant in a sexual harassment suit could effectively rebut a *prima facie* case against him by asserting his bisexuality which, if proven, would qualify his harassment as nondiscriminatory for Title VII purposes.

Most courts trying sexual harassment actions under Title VII since 1977 have used the *Barnes* logic to find relationship-oriented sex discrimination actionable. See, e.g., *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979).

55. See, e.g., *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), *petition for cert. filed*, June 1987 (voluntary, romantic relationship); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (transsexuality); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (transsexuality); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuality); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (effeminacy).

56. See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749-50 (8th Cir. 1982).

57. 807 F.2d 304 (2d Cir. 1986). See also *Yatvin v. Madison Metro. School Dist.*, 653 F. Supp. 945 (W.D. Wis. 1987).

58. 807 F.2d 304, 308 (2d Cir. 1986).

courts in the policing of intimate relationships. Such a course, founded on a distortion of the meaning of the word 'sex' in the context of Title VII, is both impracticable and unwarranted."⁵⁹ The court further observed that the term "sex" was misapplied in this suit because female therapists who were not romantically involved with the program administrator would also be denied promotion.⁶⁰ The complexity and ambiguity of these issues accentuate the need for a well-considered, well-devised policy toward defining and deterring on-the-job sexual harassment.

3. *The Issue of Sexual Harassment Is Growing in Social and Legal Importance*

Sexual harassment of working women⁶¹ is a widespread practice. Of 9000 women who voluntarily responded to one of the first work-related sexual harassment surveys, nine out of ten reported experiences of sexual harassment.⁶² The most statistically reliable studies on sexual harassment show that half of all working women have been sexually harassed.⁶³ The magnitude of sexual harassment as a social problem becomes obvious when one considers that over forty-eight million women were part of the American workforce in 1986.⁶⁴

Furthermore, the growing need for legislation on sexual harassment is evidenced by the explosion of claims in the past six years.⁶⁵ In November of 1980, the EEOC published guidelines⁶⁶ which focused the attention of America's legal community on sexual harassment. In the years before the release of the guidelines, the EEOC received an estimated 1000 sexual harassment claims per year.⁶⁷ Within the first year after release of the guidelines, 3453 sexual harassment complaints were filed with the agency.⁶⁸ Each year has brought an increase of sexual harassment claims.⁶⁹ Daniel Leach, former EEOC vice-chairman, estimated that twice as many cases were pending

59. *Id.* The court found "no justification for defining 'sex,' for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement." *Id.* at 307.

60. *Id.* at 308. The court decided:

Appellees were not prejudiced because of their status as males; rather, they were discriminated against because [the program administrator] preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for promotion: No one but [his paramour] could be considered for the appointment because of [her] special relationship to [the administrator].

Id.

61. While this Comment is concerned with sexual harassment of working men as well as women (*see supra* note 3), statistical surveys contained in this section refer only to the harassment of women.

62. Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149. Redbook published a questionnaire titled "How do you handle sex on the job?"; they received over 9000 responses. *See C. MacKinnon, supra* note 1, at 247 n.1.

63. *See B. Gutek, SEX AND THE WORKPLACE* 46 (1985) (53% of respondents had experienced sexual harassment); MERIT SYSTEMS SURVEY, *supra* note 16, at 33-36 (42% of women federal employees had been sexually harassed on the job); Rossein, *Sex Discrimination and the Sexually Charged Work Environment*, 9 N.Y.U. REV. OF LAW AND SOC. CHANGE 271-305 (1979-80) (It is safe to estimate that between 42% and 88% of the female workforce has at some point been subjected to sexual harassment.).

64. BUREAU OF LABOR STATISTICS, *Women in the Workforce*, March 1986, reprinted in *THE WORLD ALMANAC AND BOOK OF FACTS*: 1987 128 (1986).

65. *Infra* note 71.

66. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1986).

67. Low, *Victims Win Large Awards in Sexual Harassment Cases*, L.A. Daily J., July 26, 1982, at 1, col.6.

68. Lab. Rel. Rep. (BNA), News and Background Information (Part II), at 6, July 20, 1981.

69. Lab. Rel. Rep. (BNA), News and Background Information (Part II), Interview with Daniel Leach, at 8-10, July 20, 1981.

before various state and local equal opportunity agencies at the same time.⁷⁰ Leach also commented that these figures did not accurately reflect the sexual harassment situation because "nine out of 10 cases are settled before they ever get to court," and because many women would rather quit their jobs or suffer silently rather than face the embarrassment and stigma of filing a charge.⁷¹ Sexual harassment is not going to disappear, and as the issue becomes less taboo more claims will fill courts and agencies.⁷²

B. Work-Related Sexual Harassment Should Be Regulated by Congress

Congress is the best decision-making body for regulating work-related sexual harassment. Unfortunately, the decision makers who are currently addressing the sexual harassment problem in the United States are not the best groups to be doing so. For a variety of reasons, the federal judiciary, administrative agencies, and state courts and legislatures are not properly equipped to handle the issue.

1. The Judiciary Should Not Be Creating Sexual Harassment Law

Most of the current sexual harassment law has developed through judicial decisions. The Supreme Court initially used its interpretive powers to expand the scope of Title VII's work harassment and sex discrimination provisions.⁷³ Some lower courts soon followed, opening new doors to plaintiffs in prospective sexual harassment actions.⁷⁴

Throughout the judicial evolution of sexual harassment regulation, federal courts have created law where none previously existed. The 1977 decisions of *Barnes v.*

70. *Id.* at 9.

71. *Id.* According to the EEOC's 16th, 17th and 18th annual reports, in 1981, the agency received 3453 sexual harassment claims, EEOC, 16TH ANNUAL REPORT 141 (1981); in 1982, it received 4195 claims, EEOC, 17TH ANNUAL REPORT 54 (1982); and in 1983, 4468 claims, EEOC, 18TH ANNUAL REPORT 58 (1983).

72. See C. MacKinnon, *supra* note 1, at 1-3.

73. "[Title VII prohibits] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . ." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). "[In] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dep't of Water v. Manhart*, 435 U.S. 702, 707 n.13 (1978), *vacated on other grounds*, 461 U.S. 951 (1983).

74. Basing his arguments on *Griggs v. Duke Power Co.*, Judge Goldberg of the Fifth Circuit wrote that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). See *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982) (sexually demeaning work environment constitutes grounds for a cause of action under Title VII); *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) (racially discriminatory work environment clearly violates Title VII); *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1981) (Title VII "conditions of employment" can include psychological and emotional work environment); *Carroll v. Talman Fed. Sav. and Loan Ass'n*, 604 F.2d 1028, 1032 n.13 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (suggestive dress policy for women considered a Title VII violation); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977) (white plaintiff can sue employer who discriminates against blacks, because she has a right to a prejudice-free environment); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (pattern of derogatory racial remarks violates Title VII).

*Costle*⁷⁵ and *Tompkins v. Public Service Electric and Gas Co.*⁷⁶ created a cause of action for sexual harassment under Title VII of the Civil Rights Act of 1964.⁷⁷ The Act was not originally intended to address sexual harassment,⁷⁸ and only under questionable circumstances did it address sex discrimination.⁷⁹ Liability under this cause of action was extended in 1979 with *Miller v. Bank of America*.⁸⁰

In the early 1980s, federal courts were influenced by the EEOC guidelines, although the guidelines have no binding legal authority.⁸¹ *Bundy v. Jackson*⁸² and *Henson v. City of Dundee*⁸³ extended and redefined employer liability for sexual harassment to include cases where no tangible job detriment resulted from the harassment.⁸⁴ Finally, with the *Meritor* decision, the Supreme Court gave this Title VII cause of action judicial legitimacy by recognizing its existence.⁸⁵

However, creating new law is not the proper function of the courts.⁸⁶ The function of the judiciary is to interpret the laws. Even Judge Skelly Wright, a vocal advocate of judicial activism, recognizes that, "judicial review is a blunt instrument. The Court cannot make the subtle, delicate, and in a sense arbitrary distinctions which the legislature can, and frequently must, make."⁸⁷ In the regulation of sexual harassment, the courts have overstepped their constitutional interpretive powers. Court-created substantive rules are not a new phenomenon,⁸⁸ but they are opposed to the principles of American democratic government as established by the Constitution. In the American philosophy of government as recorded in the Constitution, the majoritarian branches of government, the executive and legislative branches, have the exclusive authority to initiate and enact laws.⁸⁹ The judiciary is a passive participant in the legal process.⁹⁰ Therefore, from a constitutional standpoint, the legislature should be making the types of affirmative decisions that the Court has made in dealing with sexual harassment.⁹¹

75. 561 F.2d 983 (D.C. Cir. 1977).

76. 568 F.2d 1044 (3d Cir. 1977).

77. See *infra* section II (C).

78. See *infra* text accompanying note 117.

79. *Id.*

80. 600 F.2d 211 (9th Cir. 1979).

81. See *infra* text accompanying note 97.

82. 641 F.2d 934 (D.C. Cir. 1981).

83. 682 F.2d 897 (11th Cir. 1982).

84. *Id.* at 909.

85. 106 S. Ct. 2399, 2409 (1986).

86. U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1; *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); see also *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936); *THE FEDERALIST* No. 78 (A. Hamilton).

87. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 3 (1968).

88. The Supreme Court created a substantive rule in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which forced cross-district school busing in racially segregated school districts.

89. See *supra* note 86.

90. Wright, *supra* note 87, at 6.

91. However, federal courts can create law if they do so while interpreting the Constitution. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In a very small minority of federal cases which have addressed the issue, courts have found sexual harassment to be behavior which violates the equal protection clause of the fourteenth amendment. But note that these cases are exclusively limited to situations in which a state is the employer. See *Bohen*

Similarly, from a more practical standpoint, the judiciary is not qualified to make the type of policy it has been making in the sexual harassment area. As described above, sexual harassment is a complicated and subtle societal issue,⁹² and any decision in a sexual harassment case involves making policy choices. These choices concern liability, choices about standards of proof, and choices about what acts constitute sexual harassment. Judges can and must make decisions on these issues in the absence of legislative guidance. But legislative guidelines are preferable to a series of piecemeal judicial rules. Due to the case-by-case nature of judicial law, the judiciary can never address a complicated issue in a comprehensive manner.⁹³ The aggregated policy choices of many judges deciding many cases in many contexts cannot be as effective as a well-considered policy made in the legislature after hearings and debate. Moreover, Congress has the resources to study complex social issues and the procedural mechanisms to formulate policy on them. The courts have neither these resources nor these mechanisms. "[T]he Court does not have the requisite fact-finding machinery and therefore cannot acquire the pertinent knowledge upon which intelligent social action must be based."⁹⁴ For both constitutional and practical reasons, Congress should be regulating sexual harassment.

2. Administrative Agencies Cannot Create an Adequate Sexual Harassment Law

Administrative agencies also regulate sexual harassment in the workplace. The 1980 sexual harassment guidelines of the EEOC⁹⁵ have been the most extensive and influential of these regulations. In *Meritor*, the Supreme Court recommends that the guidelines be afforded great deference.⁹⁶ However, the Court has also stated that the EEOC guidelines are properly accorded *less* weight than many other administrative regulations because Congress did not give the EEOC power to promulgate rules under Title VII that have the force of law.⁹⁷ Ambiguity concerning the EEOC's authority causes problems for the courts, who do not have to follow the EEOC's administrative opinions. Some courts have followed the guidelines, but some have not.⁹⁸ The

v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986); *Gobla v. Crestwood School Dist.*, 609 F. Supp. 972 (M.D. Pa. 1985); *Moire v. Temple Univ.*, 613 F. Supp. 1360 (E.D. Pa. 1985); *Scott v. City of Overland Park*, 595 F. Supp. 520 (D. Kan. 1984); *Skadegaard v. Farrell*, 578 F. Supp. 1209 (D.N.J. 1984); *Woerner v. Brzeczczek*, 519 F. Supp. 517 (N.D. Ill. 1981).

92. *Supra* section II (A)(2).

93. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (Holmes comments on the limitations of judicial action).

94. *Wright, supra* note 87, at 3.

95. *Supra* note 66.

96. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2405-06 (1986) ("As an 'administrative interpretation of the Act by the enforcing agency,' *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S. Ct. 849, 855, 28 L.Ed. 2d 158 (1971), these guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S. Ct. 401, 410-11, 50 L.Ed. 2d 343 (1976), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L.Ed. 2d 124 (1944)."); *but see Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977), in which the Court holds that the guidelines are *not* entitled to great weight when they are not supported by legislative history or prior judicial construction.

97. *Ansonia Bd. of Educ. v. Philbrook*, 107 S. Ct. 367, 372 n.6 (1986); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

98. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (specifically rejecting EEOC guidelines

Supreme Court decided to follow the guidelines in some sections of the *Meritor* decision,⁹⁹ but did not follow them with regard to the issue of employer liability.¹⁰⁰ In the guidelines, the EEOC suggests strict liability be applied to employers in sexual harassment cases.¹⁰¹ However, the *Meritor* Court refused to apply that standard,¹⁰² and instead suggested placing liability on employers who refuse to take affirmative steps to halt sexual harassment or who are unresponsive to harassment complaints.¹⁰³

Further increasing the complexity of the area, the EEOC, as a commission comprised of short-term presidential appointees, changes its interpretations of its own guidelines. In *Meritor*, the brief filed on behalf of the EEOC took a contrary position to the EEOC guidelines.¹⁰⁴ Justice Marshall, in his concurring opinion, notes the change in positions and finds the most recent assertion "untenable."¹⁰⁵ Even the current commissioners and staff of the EEOC are in conflict as to the meaning of the sexual harassment guidelines.¹⁰⁶

The legal confusion surrounding the EEOC sexual harassment guidelines demonstrates the need for congressional legislation on the subject. Sexual harassment is an important topic that effects so much of society that legal confusion in the area needs to be minimized. Because the EEOC has no mandatory authority, courts and agencies in many cases can ignore EEOC recommendations, leaving employers and workers bewildered as to how to react.

3. State Courts and Legislatures Are Not the Best Decision-Makers to Be Creating Sexual Harassment Law

State courts and legislatures are the third source of sexual harassment regulations. In 1981, twelve states and the District of Columbia had regulations, executive orders, or guidelines that explicitly prohibited sexual harassment.¹⁰⁷ While these actions are commendable, they cannot replace the need for general federal legislation on the subject. State governments have tended not to address the issue quickly, comprehensively, or uniformly, and in many cases they have not addressed it at

on bona fide security systems); *Washington v. Davis*, 426 U.S. 229 (1976) (rejecting EEOC guidelines on employment selection procedures).

99. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2407-08 (1986).

100. *Id.* at 2408.

101. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1985).

102. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2408 (1986).

103. Justice Rehnquist did not issue a definitive rule on employer liability, but he made a clear statement that the District of Columbia Court of Appeals "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 2408-09.

104. The government suggested using traditional agency standards when applying liability to employers, instead of using the strict liability that the EEOC guidelines supported. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 20-30, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979).

105. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2410 (1986) (Marshall, J., concurring).

106. Commissioner Rosalie Gaull Silberman argued against an interpretation of strict employer liability in sexual harassment cases in an October, 1985 brief (R. Silberman, EEOC Memorandum Regarding Commission Participation as Amicus Curiae in *PSFS Sav. Bank, FSB v. Vinson*, 210 Daily Lab. Rep. (BNA) E-1 (Oct. 30, 1985)), while EEOC Acting General Counsel Johnny Butler took an opposing stance at a meeting during the same month (J. Butler, EEOC Memorandum Regarding *PSFS Sav. Bank, FSB v. Vinson*, 210 Daily Lab. Rep. (BNA) E-2 (Oct. 30, 1985)).

107. Lab. Rel. Rep. (BNA), News and Background Information (Part II), at 4, July 20, 1981.

all.¹⁰⁸ The same can be said for state courts, which generally address the issue as a common-law tort, with differing methods and results.¹⁰⁹ A federal statute would assure uniformity, thereby reducing confusion of the laws. Moreover, federal sexual harassment regulation would affect every employer in the country.¹¹⁰ Making employers comply with one set of comprehensive regulations would prove less confusing and much more efficient than forcing interstate companies to comply with several different statutes applying differing standards of liability and differing definitions of the offense. Also, a federal statute would leave no questions in the minds of employers as to the seriousness of the problem and the commitment of lawmakers to crafting a solution. However, state courts would still be able to supplement the federal legislation.¹¹¹

On-the-job sexual harassment is a widespread national problem that needs a broad national solution. By regulating discrimination in the workplace through various civil rights acts, Congress demonstrated that this type of legislation is within its realm of power and responsibility. Since Congress started regulating sex discrimination in the workplace, it should finish the job by directly addressing the current sexual harassment situation.

C. Congress Has Not Yet Explicitly Addressed the Issue of Work-Related Sexual Harassment

Despite judicial and administrative interpretations to the contrary, the United States Congress has *not* yet addressed the issue of sexual harassment as defined in this Comment. Actions of the EEOC and the *Meritor* Court incorrectly imply that Congress dealt with the subject in Title VII of the Civil Rights Act of 1964. As Justice Rehnquist notes in *Meritor*,¹¹² the prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives.¹¹³ Representative Smith, the sponsor of the amendment to place sex discrimination under Title VII, was opposed to Title VII, and the amendment was apparently an

108. The only states to enact rules, regulations, or executive orders expressly prohibiting sexual harassment are as follows: California, sections 7287.6(b)(1) and 7291.1(f)(1)-(2) of Cal. Fair Emp. and Hous. Rules, CAL. ADMIN. CODE tit.2, div. 4 (1980); Colorado, rule 80.11 of the Sex Discrimination Rules adopted by the Colo. Civ. Rights Comm. (1972); Connecticut, CONN. GEN. STAT., § 46a-60(8) (1986); District of Columbia, Mayor Barry's Order 79-89 of May 24, 1979; Florida, Exec. Order 81-69 (1981); Illinois, Exec. Order 80-1 (1980); Indiana, Exec. Order 6-82 (1982); Kansas, Exec. Order 82-55 (1982); Kentucky, section 2, Guidelines on Discrimination as adopted by Ky. Comm. on Human Rights, codified in 104 KY. ADMIN. REG. SERVICE Ch.1 (1981); Massachusetts, Exec. Order No. 240 (1984); Michigan, section 101(h) of the Mich. Civil Rights Act, enacted by P.A. 453 (1976); Minnesota, Minn. Human Rights Act, as codified in MINN. STAT. § 363.01, subd. 10a (1985); Montana, Exec. Order No. 7-82 (1982), and MONT. ADMIN. R. 1301-06 (1983); Oregon, Exec. Order 81-7 (1981); Pennsylvania, Penn. Human Rel. Comm., Guidelines on Sexual Harassment (1981); Rhode Island, Exec. Order No. 80-9 (1980); South Dakota, Exec. Order 81-08 (1981); Wisconsin, section 111.32, Wis. Fair Empl. Act, as codified in WIS. STAT. § 111, subchap. II (1979).

109. *Supra* note 108.

110. Some small, local employers may escape liability because congressional regulation of the workplace is based on the commerce clause, with emphasis on employers who deal in interstate commerce.

111. *California Fed. Sav. and Loan Ass'n v. Guerra*, 107 S. Ct. 683, 693-94 (1987) (A state civil rights statute is not preempted by a federal civil rights statute if the two statutes are not inconsistent.).

112. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2404 (1986).

113. "[S]ex was added as prohibited classification in a last minute attempt by opponents to block passage of the Civil Rights Bill [Title VII]." *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 297 n.12 (N.D. Tex. 1981).

attempt to politically weaken the legislation.¹¹⁴ He claimed in his sponsorship speech that he proposed the amendment because, "I do not think it can do any harm to this legislation; maybe it can do some good."¹¹⁵ Debate on the amendment is sparse, and most of it centers on what effect the amendment would have on passage of Title VII as a package.¹¹⁶ As one commentator observed, "[i]n the context of that debate and of the prevailing congressional sentiment when the amendment was offered, it is abundantly clear that a principal motive in introducing it was to prevent passage of the basic legislation being considered by Congress, rather than solicitude for women's employment rights."¹¹⁷

The House engaged in very little debate on the substantive merits or detriments of outlawing sex discrimination in the workplace. The Senate had no debate on the subject. Due to the manner and date of the amendment's proposal, no committee reports or transcripts address the subject. The small amount of legislative history that does exist shows that Congress did not intend to create a remedy for most of the situations that now fall under the definition of sexual harassment.¹¹⁸ In the legislative history of the amendment, the only activities that are discussed are traditional discriminatory compensation and hiring and firing practices that are not considered to be sexual harassment.¹¹⁹ The House debate does not mention that Title VII was intended to regulate the personal sexual actions and attitudes of employees—to penalize employees for courting in the office instead of in health clubs or discotheques.¹²⁰

Because of the traditional courtship aspect of sexual harassment, it is inconceivable to think that such a hastily proposed and politically motivated amendment would have included hostile work environment sexual harassment, or even *quid pro quo* sexual harassment, when nothing relating to either type of act was mentioned.¹²¹ Furthermore, Congress was even less likely to intend a sweeping reform of workplace rules affecting the sexually-oriented relations between employees to be created with no reference to the problem, especially when "[t]he major concern of Congress at the time the Act was promulgated was race discrimination."¹²² Congress gave no acknowledgement that this effect was intended or even contemplated.

114. 110 CONG. REC. 2577 (1964). Representative Green observed that "many of the people who are most ardent in support of this amendment today were among those who . . . were the strongest in their opposition to a very simple bill to provide equal pay for equal work for women." *Id.* at 2584. Representative Smith voted against Title VII on the day after he successfully proposed the amendment to it. *Id.* at 2804.

115. *Id.* at 2577.

116. *Id.* at 2577-84, 2718-21.

117. Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 311 (1968).

118. 110 CONG. REC. 2584, 2718-21 (1964).

119. *Id.* at 2577-84.

120. *Id.* at 2577-84, 2718-21.

121. "[T]he meager legislative history regarding the addition of 'sex' in [Title VII] provides slim guidance for divining [C]ongressional intent. . . . Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." *Willingham v. Macon Tel. Publ. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975).

122. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (citing 1964 U.S. CODE CONG. & ADMIN. NEWS 2355-2519); see also Kanowitz, *supra* note 117, at 310 ("Had the sex provisions of Title VII been presented [in 1964] as a separate bill, rather than being coupled as they were in an effusion of [C]ongressional gimmickry with legislation aimed at curbing racial and ethnic discrimination, their defeat in 1964 would have been virtually assured.").

While Congress addressed racial, religious, ethnic, and sexual discrimination in Title VII of the Civil Rights Act of 1964, it had no intention of addressing the issues that the *Meritor* decision and the EEOC guidelines impute into the Act.¹²³ In fact, Congress has never actually confronted sexual harassment issues. The topic of sexual harassment has arisen occasionally in congressional committee,¹²⁴ but no legislation that deals directly with the issue has been discussed.

III. CONGRESS SHOULD TAKE ACTION IN REGULATING SEXUAL HARASSMENT

When Congress finally passes legislation regulating sexual harassment in the workplace, it must attempt to balance several competing interests. First, it must condemn sexual harassment without infringing on rights to personal association. Second, it must compel employers to take affirmative steps to limit harassment without overburdening the employers with excessive regulations. Finally, it must provide rules and guidelines for employers, employees, and courts without creating unmanageable standards.

To achieve these goals, Congress needs to: explicitly create a cause of action prohibiting sexually harassing acts and speech (including both *quid pro quo* sexual harassment and hostile work environment sexual harassment); create liability for employers who have not taken affirmative action to halt harassment in their workplaces (allowing both equitable and compensatory damage relief for victims); and provide for equitable, compensatory, and punitive damage relief from the employee who committed the harassing act. These recommendations provide the basis for a strong sexual harassment policy.

A. Congress Should Explicitly Create a Cause of Action for Sexual Harassment

Currently, no explicit federal statutory prohibition of sexual harassment exists. An explicit congressional prohibition of sexual harassment would solve several problems. Most importantly, by making the first specific statutory rule regulating sexual harassment, Congress would be reducing confusion in the law of this area, and would be making a definitive statement that sexual harassment is unacceptable conduct that will not be tolerated in the workplace.

123. Since the passage of Title VII in 1964, Congress has made no significant change in the sex discrimination provisions used by the courts to justify prohibition of sexual harassment. The 1972 Amendments to Title VII in the Equal Employment Opportunity Act were added to "remedy the economic deprivation of women as a class." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). Congress has resisted other attempts to amend the Act in the area of sex discrimination. For example, several bills were introduced in Congress in the mid-1970s to amend Title VII so that it prohibits discrimination against "sexual preference," but none has passed. (H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 166, 94th Cong., 1st Sess. (1975); and H.R. 2667, 94th Cong., 1st Sess. (1975)). Seven were presented to the 95th Congress: H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 7775, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); and H.R. 8269, 95th Cong., 1st Sess. (1977).

124. See, e.g., *Examination of Issues Affecting Women in Our Nation's Labor Force, 1981: Hearings Before the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981) (statement by Senator Orrin G. Hatch, Chairman).

The cause of action that Congress creates should include liability for both *quid pro quo* sexual harassment and hostile work environment sexual harassment.¹²⁵ Both forms of sexual harassment are currently actionable under Title VII,¹²⁶ and proscribing them would be consistent with related law. More importantly, both recognized forms of sexual harassment are offensive and degrading actions that deserve condemnation.¹²⁷

Quid pro quo sexual harassment is a form of sexual imposition that should be restricted even if it would not be considered discriminatory. It is a tortious act, comparable to rape, with a victim who is forced to submit sexually to a more powerful person or face negative consequences for resisting the attack. Catherine MacKinnon observes that like rape, "[w]ith [*quid pro quo*] sexual harassment, rejection [of a sexual advance] proves that the advance is unwanted but also is likely to call forth retaliation, thus forcing the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all."¹²⁸ Often *quid pro quo* sex discrimination is more subtle than rape,¹²⁹ but not always.¹³⁰

The case of *Munford v. James T. Barnes & Co.*¹³¹ is a typical example of the ramifications of *quid pro quo* harassment. Plaintiff was repeatedly propositioned by her supervisor, and she always refused the propositions.¹³² When she refused to accompany her supervisor on a business trip, in which she was expected to share a hotel room and have sexual relations with him, she was discharged from her job.¹³³ Thus, *quid pro quo* sexual harassment creates a no win situation for the victim.

Conversely, hostile environment sexual harassment frequently creates no measurable harm. However, a harm still exists in hostile environment cases. Federal courts have recognized a cause of action for this harm in racial, religious, and ethnic discrimination cases.¹³⁴ More recently, the court-created cause of action has been

125. These two categories of sexual harassment are not necessarily a natural separation. "On a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 & n.1 (3d Cir. 1977)." *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982). The Federal District Court for Alaska agrees:

The distinction between "tangible job benefit" ("*quid pro quo*") cases and "hostile work environment" cases is often discussed by courts, but this court finds it an extremely slippery concept. The situations which are dealt with in sex discrimination cases present a factual and legal continuum. There is no square peg that fits into a square hole nor a round peg for a round hole. Rather, there is a seemingly endless variety of sex discrimination cases with one situation blending into another when comparisons are made.

Jeppsen v. Wunnicke, 611 F. Supp. 78, 83 (D. Alaska 1985) (citations omitted).

126. Hostile environment sexual harassment was confirmed as a cause of action under Title VII in *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2409 (1986); *quid pro quo* was held actionable in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

127. See *infra* notes 128-40 and accompanying text.

128. C. MacKinnon, *supra* note 1, at 46.

129. *Id.* at 32-40. One woman was told by her supervisor that "she would be better served if she 'linked both her professional work and her personal life to his own needs.'" *Id.* at 34.

130. *Id.* at 32.

131. 441 F. Supp. 459 (E.D. Mich. 1977).

132. *Id.* at 460-62.

133. *Id.*

134. *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin); *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (race); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976) (race); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religion).

extended to sexual discrimination.¹³⁵ The Eleventh Circuit described the harm caused by hostile environment sexual harassment:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹³⁶

The *Bundy v. Jackson*¹³⁷ case illustrates this problem. The plaintiff, Bundy, was never threatened with loss of employment benefits. However, she was subjected to lewd remarks and sexual propositions from her superior.¹³⁸ When she complained to a higher supervisor, he told her that "any man in his right mind would want to rape you,"¹³⁹ and then he propositioned her.¹⁴⁰ Bundy suffered no measurable economic harm, but she was harmed nonetheless. She was degraded and abused by men with power over her employment. Any statutory cause of action for sexual harassment should provide liability for all harassment, regardless of whether or not the harm caused by the harassing behavior is tangible.

B. Congress Should Force Employers to Take Affirmative Steps to Fight Sexual Harassment

In establishing a cause of action for sexual harassment, Congress should assign liability to employers who do not take affirmative steps to stop sexual harassment in their workplaces. Doing so would force employers to address the issue of sexual harassment in a positive manner while avoiding many of the inequities that strict liability can bring.¹⁴¹ The type of employer liability rule recommended in this Comment was described by the United States and the EEOC in their *Amici Curiae* brief to the Supreme Court in *Meritor*. They called for "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint

135. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

136. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

137. 641 F.2d 934 (D.C. Cir. 1981).

138. *Id.* at 940.

139. *Id.*

140. *Id.*

141. Burdening employers under a standard of strict liability is overly harsh, and the policy goals derived from such action can be attained through the more reasonable methods suggested in this section. Strict liability for supervisor harassment would effectively force the employer to pay for all sexually-oriented words or actions that an employee finds offensive, regardless of whether the employer had taken affirmative steps to eliminate all such conduct, and regardless of whether the employer could have known about the action. Also, at least in hostile environment cases, the liability would usually be imposed on an employer for behavior *outside* the scope of its supervisor's authority. ("[W]hen supervisory personnel engage in such activity, they act outside the scope of their authority. . . ." *Ferguson v. E.I. duPont de Nemours and Co.*, 560 F. Supp. 1172, 1199 (D. Del. 1983).).

Strict liability would put employers in "a virtually indefensible legal posture." Conte and Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 *DRAKE L. REV.* 407, 410 (1982-83). If an employer takes affirmative action to prohibit sexual harassment at his workplace—anti-harassment policy statements, a well-publicized and confidential grievance procedure, and strict, well-enforced penalties for harassing supervisors—he should not be made to pay for an action which he never had the opportunity to redress by established company procedures. See *Ferguson v. E.I. duPont de Nemours and Co.*, 560 F. Supp. 1172, 1199 (D. Del. 1983). Strict liability leaves too much room for abuse of the law by dissatisfied or vengeful employees.

regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint."¹⁴²

Under such a rule, an employer would be liable for the sexual harassment of a supervisory employee if the employer knew about the harassment and took no steps or took inadequate steps to remedy the situation. The employer would also be liable if the victim employee had no practical method of notifying the employer of the harassment. Thus, to be safe with regard to liability in sexual harassment cases, employers would have to put in place a reasonable complaint procedure and actively encourage its use. The policy would have the effect of alerting employees to the seriousness of sexual harassment and opening channels of communication to provide relief. Furthermore, under the proposed rule, "if an employer had an express policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of the procedure," then the employer would be sheltered from liability.¹⁴³ This avoids trapping conscientious employers by holding them liable without allowing them an opportunity to provide a remedy for the act of harassment.

When an employer is held liable, both equitable and compensatory relief should be allowed to the plaintiff. This affords judges complete freedom to provide whatever remedy seems reasonable under the circumstances.

C. Congress Should Create a Federal Cause of Action Against the Harassing Employee

Currently, the only personal causes of action against a harassing individual are state court tort claims.¹⁴⁴ However, the individual who actually commits the violation should be held responsible for that action. Assignment of personal liability to any supervisory employee who sexually harasses a nonsupervisory employee, and holding the harassing employee responsible for equitable, compensatory, and punitive relief would prove most effective. Allowing such penalties strikes at the heart of sexual harassment by forcing employees to be personally accountable for their own actions in the workplace. The severity of the penalties serves as a punishment for socially unacceptable behavior and a warning to other employees.

IV. CONCLUSION

Congress should prohibit and regulate sexual harassment through the passage of new legislation. Many working Americans at some time will be affected by sexual harassment. Some individuals need help in fighting harassment, while others need to

142. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2407-08 (1986) (citing Brief for United States and Equal Employment Opportunity Commission as Amici Curiae at 26, *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) (No. 84-1979)).

143. *Id.*

144. *E.g.*, *Howard Univ. v. Best*, 484 A.2d 958 (D.C. 1984) (intentional infliction of emotional distress, plaintiff awarded compensatory damages); *Phillips v. Smalley Maintenance Serv.*, 435 So. 2d 705 (Ala. 1983) (intrusion, plaintiff awarded compensatory damages); *Skousen v. Nidy*, 90 Ariz. 215, 367 P.2d 248 (1961) (assault and battery, plaintiff awarded both compensatory and punitive damages). See generally Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461 (1986).

know what to do to avoid liability. The problem will not diminish, and the noncongressional attempts to address it have left the law in a state of disorder. Only through federal legislative initiative can order be restored to the workplace.

Sexual harassment, because of its complexity and its relatively recent development as a legal issue, is a fertile field for additional scholarly attention. Several of the topics mentioned herein deserve further cultivation. This Comment only provides an overview of sexual harassment theory, and just glances at the many issues which must be addressed if the law is to grow in a sensible manner. The law prohibiting sexual harassment in the workplace will continue to grow, but it should grow to reflect a well-considered congressional policy and not a confused fusion of judicial, administrative, and state decisions.

Theodore F. Claypoole